STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 14, 2006
v	No. 261044 Allegan Circuit Court
THOMAS EUGENE SIMONDS, Defendant-Appellant.	LC No. 04-013776-FC

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to commit murder, MCL 750.83; two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; first-degree home invasion, MCL 750.10a(2); felon in possession of a firearm, MCL 750.224f; and discharging a firearm during a felony, MCL 750.234b, for his actions arising out of a confrontation with his estranged wife, Linda, and Linda's boyfriend, Mark Madsen. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of imprisonment of 20 to 40 years for each assault conviction, 217 months to 40 years for his home invasion conviction, 43 months to 10 years for his felon-in-possession conviction, and 3 to 8 years for his discharging a firearm conviction. These sentences are to be served consecutively to two concurrent two-year sentences for defendant's felony-firearm convictions. Defendant appeals as of right. We affirm.

The evidence presented at trial indicated that Linda was granted exclusive possession of the marital home after she and defendant began divorce proceedings in June or July 2003. However, on July 11, 2004, Linda and Madsen arrived at the house to find defendant inside, wielding a shotgun. Linda escaped and called the police. Madsen and defendant remained inside and became involved in a physical altercation during which the shotgun was discharged twice. Defendant gained control over Madsen, placed him in handcuffs, and took him upstairs to the master bedroom. During a telephone conversation with police, defendant became incoherent and lost consciousness. Madsen left the house after he determined that defendant was unresponsive. After defendant was apprehended, his vehicle was discovered parked one or two miles away. The prosecution's theory at trial was that defendant planned to kill Linda and commit suicide, but later, he decided to kill both Linda and Madsen after they arrived together to the home. Defendant testified at trial, and admitted that he watched the house from the surrounding woods for several days before he entered it. He claimed that he was depressed after experiencing several recent tragic events and that he decided to commit suicide in the house,

which was the place he felt most comfortable. He maintained that he never intended to kill Linda and Madsen. The jury disagreed and convicted defendant as charged.

On appeal, defendant first argues that he was denied a fair trial because the trial court failed to order an independent psychiatric evaluation to determine his sanity at the time of the alleged offense.

MCL 768.20a governs the use of an insanity defense in felony cases. A defendant must serve the court and the prosecutor with notice of his intent to pursue an insanity defense at trial. MCL 768.20a(1). Upon receipt of a defendant's notice of his intent to assert an insanity defense, a trial court must order the defendant to undergo a psychiatric examination conducted by the state Center for Forensic Psychiatry or other qualified personnel. MCL 768.20a(2). Additionally, a "defendant may, at his or her own expense, or if indigent, at the expense of the county, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed." MCL 768.20a(3).

Defendant never filed a notice of his intent to assert an insanity defense, but he requested that the trial court order an examination at the Center for Forensic Psychiatry. The trial court entered an appropriate order. The psychiatric evaluator opined that defendant was mentally ill, but was not legally insane, and that defendant was competent to stand trial. Defendant's trial counsel did not object to the report, but he indicated that the defense "*may wish*" to have another expert review the matter or to file a motion to see if he could get another person "to look at this." The trial court stated:

> He certainly can hire someone to represent him if you can afford to do that, or his family can afford to do that, in terms of doing a forensic exam. This Court has no interest in providing anything beyond the Forensic Center.

The trial court thereafter ruled that defendant was competent to stand trial. It never entered a written order regarding an independent psychiatric evaluation.

A trial court has no discretion to deny a psychiatric examination by the Center for Forensic Psychiatry under MCL 768.20a(2). *People v Chapman*, 165 Mich App 215, 218; 418 NW2d 658 (1987). Defendant requested, and received, that examination. However, a second independent psychological examination is not mandatory. MCL 768.20a(3). The use of the word "may" in the statute permitting an independent psychiatric evaluation expresses that the action is permissive and not mandatory. See *Grabow v Macomb Twp*, 270 Mich App 222, 229; 714 NW2d 674 (2006).

Defendant argues that the trial court defeated the legislative purpose of MCL 768.20a because defendant was denied the opportunity to prepare for a "possible insanity defense" at public expense. However, defendant was evaluated once to determine his criminal responsibility and competency to stand trial. His trial counsel stipulated to the admission of these evaluations, and never presented further support for an insanity defense. The statements by defendant's trial counsel at the competency hearing were an equivocal indication that the defense might request such an examination in the future. And, the trial court never formally ruled on a proper request for an independent psychiatric exam. Additionally, the defense never filed a notice of intent to pursue an insanity defense at trial. Moreover, on this record, we find that there is no evidence to

support the validity of an insanity defense in this case. The evidence presented demonstrates that defendant did not lack "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirement of the law." *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001), quoting MCL 768.21a(1). There has been no showing that defendant could meet his burden of proving an insanity defense by the preponderance of the evidence. *Id.* at 231; MCL 768.21a(3). We find no error requiring reversal.

Next, defendant challenges the admissibility of prior bad acts evidence, and he argues that he was denied the effective assistance of counsel because his trial counsel failed to object to the now-challenged testimony. We review an unpreserved challenge to the admission of evidence for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The denial of effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of fact for clear error, and questions of law de novo. *Id.* In the present case, our review is limited to mistakes apparent on the record because no *Ginther*[1] hearing was held.

Defendant argues that he was prejudiced by Linda's testimony that he once choked her to the point of unconsciousness and that he previously served time in prison. Defendant has failed to adequately brief his issue as it relates to Linda's testimony that he previously served time in prison. A party may not make a bald assertion and "leave it to this Court to search for authority to sustain or reject its position." *People v Mackle*, 241 Mich App 583, 604; 617 NW2d 339 (2000), quoting *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Where a defendant fails to argue the merits of an allegation of error, the issue is not properly presented for review. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Thus, defendant has abandoned this part of his argument.

MRE 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts of an individual to prove a propensity to commit such acts. However, such evidence may be admissible for other purposes under MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of inclusion, not a rule of exclusion, *People v Katt*, 248 Mich App 282, 303; 639 NW2d 815 (2001), and evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is: (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant under MRE 402 to a fact of

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403. *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 75.

A prosecutor must provide reasonable notice of his intent to present bad acts evidence before trial, or at trial if pretrial notice is excused by the trial court. MRE 404(b)(2). This notice requirement forces the prosecutor to proffer only relevant bad acts evidence, ensures that the defendant has the opportunity to object and defend against the evidence, and facilitates a trial court ruling grounded on an adequate record. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001). Here, the prosecution filed a notice of intent to admit evidence of other wrongful acts pursuant to MRE 404(b), specifically evidence that defendant "previously battered the victim [Linda] on or about December 11, 2003." The notice provided to defendant adequately described the nature of the evidence that the prosecution wished to introduce, as well as the rationale for introducing it.

At trial, without objection from defendant, Linda testified that defendant once choked her into unconsciousness. Defendant argues that this testimony was an improper attack on his character. Linda provided the challenged testimony while describing defendant's previous threats to kill her; therefore, it was offered for the specific proper purpose of demonstrating that he intended to kill Linda on June 11, 2004. To establish the crime of assault with intent to commit murder the prosecution was required to prove, in addition to other elements that defendant acted with the specific intent to kill. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "The intent to kill may be proved by inference from any facts in evidence." *Id.* Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish the elements of assault with intent to murder. *Id.*; *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Defendant's prior assault against Linda was properly used to show his intent at the time of the crimes charged in this case.

Additionally, the evidence was highly relevant to the elements of the assault charge, and its probative value far exceeded the danger of unfair prejudice attendant to the evidence. Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. An MRE 403 determination is "'best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony.'" *People v Sabin (After Remand)*, 463 Mich 43, 71; 614 NW2d 888 (2000), quoting *VanderVliet*, *supra* at 81.

In this case, the evidence that defendant previously choked Linda to the point of unconsciousness was significantly probative of the elements of the assault charge. Moreover, on appeal, defendant admits that his intent toward Linda and Madsen was a contested issue at trial. In addition to being highly probative, the record does not demonstrate that the jury used the evidence for an unduly prejudicial purpose, such as improper character evidence, rather than as evidence bearing on intent. And, the danger of unfair prejudice did not substantially outweigh

the probative value of the challenged evidence. The jury heard unchallenged evidence that there was domestic violence between the couple and that defendant had previously threatened to kill Linda. Moreover, defendant did not request a limiting instruction or object to the absence of one, and the trial court did not give a limiting instruction to the jury regarding this evidence. However, in the absence of either a request or an objection, a trial court is under no duty to give a limiting instruction sua sponte. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

Defendant has not demonstrated plain error in the admission of the challenged evidence. Additionally, defendant was not denied the effective assistance of counsel. Any objection by counsel to the admission of the evidence would have been futile, and counsel cannot be faulted for failing to make a futile or meritless objection. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell